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Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 295.

FLORENCE SAMUELS LANDRESS,
Petitioner,

versus

PHOENIX MUTUAL LIFE INSURANCE COMPANY
and TRAVELERS INSURANCE COMPANY,
Respondents.

Consolidated Causes.

SUPPLEMENTAL BRIEF FOR PETITIONER.

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I.

It will, of course, be conceded that death from the effect of the heat of the sun is not a result which, in the ordinary course of things, is reasonably to be expected from playing golf. And counsel seem to agree that, according to popular understanding, such a death is an **accidental result.** But they say that, nothing else appearing, it can-

not be said that the injury resulting in death was effected through **accidental means or cause.**

II.

The decision below is based squarely on the view that the death resulted from the voluntary act of exposure to the heat of the sun and hence the injury was not effected through **accidental** means. The question was briefly disposed of thus:

> "The high temperature was natural and not accidental and it is not alleged that the insured's acts and conduct upon the golf course were other than he intended."

In other words, because insured did only what he intended in the way he intended, it follows that the resulting injury was not brought about by accidental means.

This ignores (1) the rule that when one does an intentional act he is deemed to intend only the consequence which naturally and in ordinary course of things result from such an act, and (2) the fact that death is not one of the things which can reasonably be expected to result from playing golf.

III.

The Court must determine which of two lines of cases has correctly interpreted Accident Association v. Barry, 130 U. S. 100.

There is no disagreement as to the general rules established by that case.

(1) An accident is something unforeseen, unexpected, unusual, happening by chance and not in the ordinary course of things.

(2) That which is the natural, usual and reasonably to be expected result of an intentional act has no element of the accidental in it.

(3) But if in the doing of an intentional act, something unforeseen, unexpected occurs producing an injury which does not ordinarily follow such an act, then the injury has been brought about by accidental means or cause.

There is, we believe, no disagreement as to these propositions. The disagreement is as to what is necessary to show the intervening accidental cause.

IV.

The Court below and some other courts hold, in effect, that the intervening accidental cause cannot be inferred or presumed from the fact that the result of the intentional act is out of all proportion to what was reasonably to be expected from the act. According to them, it is necessary to show, in some affirmative way, just what the intervening cause was. These cases recognize that an unexpected and unintended result may properly be, and usually is, called an accidental result but draw a distinction between

an **accidental result** and a result brought about by **accidental means.** And so, in this case, counsel seem to agree that insured suffered an **accidental death** but insist that the declarations do not show that it was brought about by **accidental means.** This, it seems to us, is a plain contradiction in terms. How is it possible for any **result** to be accidental unless there is an element of the accidental in the **means** by which it is produced? Certainly the distinction is too fine to be perceived by the ordinary policyholder who, giving the language used its ordinary meaning, naturally supposes he is insured against accidental **results.**

V.

The distinction mentioned in the preceding paragraph, as shown by the cases cited in the petition and supporting brief, has been rejected by most of the federal courts. Indulging in no hair-splitting or fine distinctions but construing language as it is ordinarily understood, they hold, in effect:

(1) That when a result is one which does not, in the usual course of things, follow and is not reasonably to be expected to follow, from a given act, it is an **accidental** result.

(2) That every accidental result is necessarily brought about by some accidental means or cause.

(3) That when it appears that a **result** was accidental, it is not necessary to show which of the many

accidental **causes** that might have produced it did actually intervene.

This is the sound and rational construction to be put on policies of this kind. If one intentionally jumps from a tenth-story window, the natural result is death. No inference is possible except that death was intended. If one steps down a distance of one foot, this is an act which is usually performed in safety and from which injury is not reasonably to be expected. Nothing else appearing, the reasonable inference is that he intended and expected to perform the act in safety and that some unexpected and accidental cause intervened to prevent his doing so.

If it can be said that the fact that one jumps from a platform four or five feet high leaves it doubtful whether the resulting injury was one which was reasonably to be expected, the doubt is resolved when it appears that others made the same jump at the same time and place without injury. As said in the Barry case, the presumption or inference is that he intended and expected to land safely, and that he did not was an accident.

We call attention to the reasoning of two federal cases not cited in our original brief in both of which the policies were the same as in this case. They support and emphasize the rule that whether a given result has been brought about by accidental means or cause is to be determined according as such a result is or is not one which ordinarily follows and hence is reasonably to be expected from the intentional act.

Norris v. New York Life, 49 Fed. (2) 62. In this case, the Circuit Court of Appeals for the Fourth Circuit, said:

> "Here the insured interfered in an altercation, evidently for the purpose of dissuading his brother from shooting another. He could not believe, nor would any reasonable man have believed, that his brother would shoot him. When his brother did shoot and kill him, it was within the meaning of the law an accidental cause."

New York Life v. Gustafson, 55 Fed. (2) 236. In this case a professional boxer, while engaged in a boxing match, received a blow on the chin which broke his neck and killed him. The Circuit Court of Appeals for the Second Circuit said:

> "That the man's death resulted from a boxing blow is a fact; that a man enters such a contest knowing that his opponent will inflict the hardest blows possible, that death occasionally comes in a boxing match, all are facts. But that such facts make death in such a match nonaccidental by no means follows, any more than every death in sports—wrestling, fencing, baseball, football—is nonaccidental because of the fact that occasionally happens. Accidental has in it the element of improbable, unusual, by chance."

The stipulated facts disclosed nothing throwing light on the exact cause of the unusual result and the Court did not find it necessary to determine just what that cause was, contenting itself with referring to several things

any one of which might possibly have been, but none of which was shown to have been, the cause of the unexpected death, as follows:

> "The deceased possibly had his chin raised so that his opponent's blow had an increased range and effect of leverage. The position of his opponent might have been at such a lower level that his upward stroke was delivered with telling effect. The particular position of the deceased's chin, and the angle from which his opponent's blow came, might have been such as to make the blow a neck-breaking one, when a slight departure from those angles would have no such effect."

VI.

While there are a number of cases to the contrary, the decided weight of authority in the state courts is that when sunstroke follows a voluntary act which cannot reasonably be expected to produce such a result, it is brought about by accidental means. We will not attempt to review these cases but refer to those collected in the note to Richards v. Standard in 17 L. R. A., page 1183, and especially to the review of the authorities by the New Jersey Court in the very recent case of Lower v. Metropolitan, 168 Atl. 592.

VII.

But, even under the rule invoked by counsel, the demurrers to the third counts should have been overruled.

Those counts alleged that the intervening accidental means or cause was the condition, unknown to the insured, which, for the time being, rendered him supersensitive to the heat of the sun. This makes a case under the sound rule that a voluntary act is an accidental act if performed under conditions which, if known, would have deterred from performance.

VIII.

It is said that sunstroke is a disease. The declarations do not attempt to give a name to the injuries from which insured died. They merely allege that the force of the sun's rays upon his head and body inflicted bodily injuries from which he was overcome and died. But if it was sunstroke and even if it be conceded that sunstroke is a disease, it is certain that he did not have it until it was caused by the force of the sun's rays to which he was exposed by playing golf. It was, in fact, the bodily injury which was effected by accidental means.

It is true that the Phoenix policies expressly except death resulting directly or indirectly, wholly or partly from disease. But the meaning of this language seems to be one thing about which all the authorities are in accord. A disease existing at the time of the accident and not one caused by the accident itself is meant.

If one dies as a result of accidental injuries but it appears that the injuries would not have been fatal but for a disease existing at the time of the accident, then the

disease would be a contributing cause which would bar a recovery. On the other hand, if one who is suffering from a serious disease is killed instantly by being accidentally shot through the heart, it cannot be said that his death has resulted wholly or partly from disease. Again, if one in sound health receives an accidental blow which produces a disease followed by death, that death has resulted, independently of all other causes, from an accidental blow (Ryan v. Continental Casualty Company, 47 Fed. [2] 474; Order of United etc. v. Edwards, 52 Fed. [2] 187; Lower v. Metropolitan Insurance Company, 168 Atl. Rep. 592).

A familiar example is pneumonia. A bodily injury which would not, in the case of a person in good health, be serious might very well be fatal to one already suffering from pneumonia on account of his weakened and diseased condition. In such case, death results at least partly from disease. On the other hand, it is well known that pneumonia may be produced by a blow. A person in perfect health may receive such an accidental blow that he dies of traumatic pneumonia. But, in that case, the disease itself is caused by the blow. Without the blow there would have been no disease. Hence death has resulted solely from the accident.

But sunstroke should not be held to be a disease. There are a few cases, cited by counsel, which have so held. But the great weight of authority is that, while scientifically and for medical purposes, it is sometimes called a disease,

it does not have that meaning in the popular mind. To the ordinary man, and hence in insurance policies, it is like a stroke of lightning, freezing and drowning—an accident. The authorities to this effect are collected in a note to Richards v. Standard in 17 A. L. R. at page 1183. And a later review of the authorities is contained in a strongly reasoned opinion in Lower v. Metropolitan, 168 Atl. 592.

IX.

It happens that the recent case of Lower v. Metropolitan decided by the Court of Errors and Appeals of New Jersey, and published in 168 Atl. Rep., p. 592, which was a sunstroke case, decides every question involved in this case. With its strong reasoning and citation of authorities, it supports every proposition for which we contend as follows:

(1) The means by which the injuries resulting in death were effected was the act of the insured in playing golf.

(2) Death resulted from injuries caused by the heat and force of the sun's rays and whether these injuries be called sunstroke or what not, they were bodily injuries.

(3) The injury which the insured suffered was not one which was to be reasonably expected from playing golf in the sun. Hence, it was effected through **accidental** means.

(4) The exception, in the policies, of death resulting

wholly or partly from disease applies only to pre-existing disease and not to disease produced by the accident itself.

(5) Sunstroke is not a disease but is an accident.

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